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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 TRESSA GATTINELLA, et al.,

4 Plaintiffs,

5 v.

14 CV 5731 (WHP)

6 MICHAEL KORS (USA), INC., et
7 al.,

8 Defendants.

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9 New York, N.Y.
10 August 6, 2015
4:00 p.m.

11 Before:

12 HON. WILLIAM H. PAULEY III,

13 District Judge

14 APPEARANCES

15 TYCKO & ZAVAREEI

Attorneys for Plaintiffs

16 BY: HASSAN A. ZAVAREEI

17 - and -

18 KOPELOWITZ OSTROW FERGUSON

Attorneys for Plaintiffs

19 BY: JEFFREY M. OSTROW

20 - and -

21 LAW OFFICES OF WAYNE KREGER

Attorneys for Plaintiffs

22 BY: WAYNE S. KREGER

23 Paul, Weiss, Rifkind, Wharton & Garrison

Attorneys for Defendants

24 BY: LESLIE G. FAGEN

DARREN WRIGHT JOHNSON

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(Case called)

THE COURT: All right. Good afternoon, gentlemen. I have before me the plaintiff's application for preliminary approval. Do counsel wish to be heard?

MR. OSTROW: Yes, your Honor. Jeff Ostrow on behalf of the settlement class. How would you prefer that we proceed this afternoon? I could run through the settlement or I can answer questions.

THE COURT: I mean, I've reviewed your proposals. I guess, first, what is the anticipated cost of settlement, the settlement administration here?

MR. OSTROW: It's approximately \$550,000, and we will have a cap on those costs in our final contract with Epic Systems, the administrator that we've selected.

THE COURT: Have you worked with Epic before?

MR. OSTROW: Many, many times. In fact, counsel, Mr. Zavareei and I, have probably settled ten cases together across the country in the last four or five years; and we've used them almost exclusively on very large cases. And they've been terrific to work with. Very efficient, they stay within the cost parameters that we contract with them, and they've done a very good job.

THE COURT: How many Michael Kors outlet stores are there around the country?

MR. OSTROW: I would defer to counsel.

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1 THE COURT: Approximately.

2 MR. OSTROW: Couple hundred.

3 THE COURT: A couple hundred?

4 MR. OSTROW: Yes.

5 THE COURT: With respect to the notice that's
6 envisioned, you speak of a newspaper advertisement. Where's it
7 going to be published?

8 MR. OSTROW: So the publication portion of the notice
9 which you're speaking of is twofold. It will be in newspapers
10 and it will be in magazines as well as some -- I should say a
11 third facet, which is Internet advertisements, some targeted
12 cites. The newspapers and publications will be a national
13 publication in which in the areas in which the -- the outlet
14 stores are located. So it should cover, you know, nationally
15 and all those areas where those 200 locations are.

16 THE COURT: How far did discovery progress in this
17 case?

18 MR. OSTROW: Paper discovery, I would say written
19 discovery, interrogatories, admissions, we exchanged those; and
20 we had pretty extensive informal discovery with respect to
21 damages and data which our experts reviewed in coming to damage
22 models and ultimately assisted us in getting to a figure with
23 these gentlemen.

24 THE COURT: I ask because when I look at the docket
25 sheet, I see that a stipulation for confidentiality was only

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1 entered in February of this year, and two months later you're
2 advising me that there's a proposed settlement. So how many
3 documents were produced?

4 MR. JOHNSON: Your Honor, I don't remember how many
5 pages. A lot of the document production consisted of taking
6 information that was in databases and reducing it down and
7 creating information that could be provided more easily to
8 plaintiffs rather than giving them reams and reams of paper.
9 So really was getting at the numbers in terms of consumers and
10 sales levels, and things like that.

11 MR. OSTROW: We had extensive meetings, and there was
12 extensive negotiation based upon the damage aspect of it, and
13 that's really where, after we realized that this case was
14 appropriate for resolution, we wanted to focus on coming up
15 with a figure and understanding their sales numbers, the number
16 of consumers, what we were really talking about, because the
17 data, it's not -- you know, I talked about some cases that we
18 resolved, well, those were cases against defendants in which
19 they were able to provide us with the names and addresses and
20 exactly the amounts of money that were at issue. This is a
21 different situation in which we had to rely on a significant
22 amount of information that they were able to accumulate based
23 upon their sales and work backwards. Once we realized it was
24 appropriate for settlement, that's when we started to talk
25 about the damage aspect of it, and that's really when we

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1 focused on it.

2 THE COURT: When was that epiphany?

3 MR. OSTROW: I would say within the first few months
4 after the initial complaint was filed, we reached out and
5 decided, let's see if it makes sense before both sides really
6 dive into the pool and get extensively into depositions and see
7 whether or not there's interest. We do that in all our cases
8 because we believe it's efficient for all parties.

9 THE COURT: Were any depositions taken on this case?

10 MR. OSTROW: No.

11 THE COURT: In your proposed order, you provide for
12 this Court's authorization appointing all three of your law
13 firms as counsel for the class in this case. Why is that
14 necessary?

15 MR. OSTROW: Well, all three of the firms have been
16 involved in this case and similar cases that we're working on
17 from the outset.

18 THE COURT: I don't care about similar cases. I only
19 care about this case, and I'm trying to figure it out.

20 MR. OSTROW: Understood. So all three have been
21 involved from the outset. All three have had related but
22 different roles involved in this case. Some of them have
23 relationships more directly with the plaintiffs. Some have had
24 more relationships dealing with the defense in settlement
25 negotiations. There is -- a large aspect of these cases is not

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1 just how you get here, it's what you do once you get here. And
2 if the Court provides that approval, you know what the process
3 entails. And there's a significant amount of work and time
4 that's going to go into this. There's significant costs that
5 go into these cases, and I believe that it's appropriate to
6 appoint the three firms that have been involved in these cases,
7 that have been involved in the liability as well as the
8 damages, and there's significant liability with firms that take
9 on the role as class counsel. So my response would be that
10 it's appropriate for all three.

11 The cases filed in the state of -- excuse me, mere in
12 New York. We've got plaintiffs in California. We have
13 licensed California attorneys. Other firm counsel are not
14 licensed out there necessarily. We have firms that are
15 licensed here that have pro hac'd in or assisted in bringing
16 other firms in. So that's kind of the relationship between the
17 three.

18 THE COURT: Well, look, I'll tell you right now, I'm
19 not authorizing the appointment of three law firm, all right,
20 nor am I going to take on the role of being the protector of
21 the class. The fact of the matter is that I don't think I need
22 lawyers from Washington, Fort Lauderdale, and New York all
23 present in the courtroom for a motion for preliminary approval,
24 or on any other motion. So I'm telling you right now, you can
25 decide among yourselves which firm is going to be counsel, but

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1 I'm only authorizing one counsel in this preliminary order.
2 And when the submissions are made, I expect there to be
3 appropriate documentation relating to the attorneys' fees, the
4 experts. I take it you retained and have paid experts?

5 MR. OSTROW: Yes.

6 THE COURT: All of that is going to have to be
7 described in excruciating detail to me.

8 MR. OSTROW: And it will be. And we understand.

9 THE COURT: I mean, I have two plaintiffs who you
10 propose to give incentive awards to. They haven't appeared for
11 a deposition. They never showed up here. They're just the
12 instrument by which this case got here. You can include that
13 in your proposal, but I may not be inclined to approve that.

14 MR. OSTROW: May I respond to your point about why
15 three counsel?

16 THE COURT: Yes.

17 MR. OSTROW: And I'm not asking you to necessarily --
18 you're going to make your decision. I'm not asking you to
19 reconsider.

20 THE COURT: Right, I already have made my decision.

21 MR. OSTROW: But it's important, you asked why there's
22 three here today. When we come here today, we don't know
23 whether you're ultimately going to enter an order approving it
24 or not. We haven't necessarily discussed the merits of the
25 settlement which I think are important because I think it's an

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1 excellent settlement. When we take a case, we are prepared to
2 try the case. We hope that we can reach a resolution early.
3 That's really beneficial for the class. We believe that we've
4 done that here. But in the event that we don't, we have to be
5 prepared to do what we set out to do, and that's to try the
6 case. They're extremely expensive, as this Court knows. They
7 take a lot of time. And it's nice when a firm has hundreds of
8 lawyers that you're defending against, but we don't, so we pool
9 resources, we pool time, and we prepare it to go to war. So
10 that's why when we come before your Honor, there's three firms
11 and that we ask that you approve it. I understand the ruling.
12 I respect that.

13 THE COURT: I understand how it works. I understand
14 what the mechanics are, but there isn't much there. What I see
15 in this case, okay, the case was filed on July 25 of last year.
16 All right. If I remove from the docket sheet all the motions
17 for admission pro hac vice and all the reports by the clerk's
18 office as to filing errors by both sides in this case, instead
19 of having an 11-page docket sheet, I'd have a docket sheet that
20 I could quickly read and analyze and understand to be about two
21 pages. We had an initial conference on October 31 in which I
22 sat and talked to the parties. The next thing that happened
23 was the filing of a motion, essentially unopposed motion, to
24 file a second amended complaint at the end of December. And
25 then there was nothing until the stipulated confidentiality

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1 order was entered in February. What documents were produced by
2 the defendants or other information, Mr. Johnson, before the
3 confidentiality order was entered?

4 MR. JOHNSON: My recollection, your Honor, is that we
5 had exchanged discovery requests with each other, including
6 document requests and interrogatories and informal discovery
7 requests as well, but that nothing was actually produced until
8 the day that was entered, and that's what led us to --

9 THE COURT: That would have been my conclusion, too.
10 So whatsoever happened in this case in terms of analysis
11 happened between February 6 and April 8 when I was notified.
12 So I'm telling you now about some of the issues.

13 How many people are going to make up this class,
14 Mr. Ostrow?

15 MR. OSTROW: I mean, we in the papers put tens of
16 thousands. The answer is it could be hundreds of thousands.
17 It could be a million. It's probably a million. The return
18 rate on what we expect is, obviously, significantly less. We
19 think that's going to be a very, very significant recovery for
20 each class member. We've made an extremely easy claims
21 process. Every dollar's going back out. There's no reversion.
22 There's a low threshold for recovery. You attest that you
23 purchase the product within the list of products, you'll get a
24 percentage of the settlement fund. If you have purchase
25 receipts with a dollar amount, you can get additional money

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1 above and beyond just the individuals that attest to it. It's
2 an extremely fair settlement. And one of the hallmarks that
3 we're pretty proud of, and it's the first time this has
4 happened in any of these cases, is there's a change that'll be
5 taking place at all the outlets. They're actually going to be
6 educating their consumers, making a change in the price tag,
7 the very conduct we complained of which is this MSRP
8 comparative pricing. They're going to change the wording,
9 they're going to use language that people understand, and
10 they're going to have in-store displays which define the
11 language on the price tag. And I applaud them for doing it
12 because it's a big move. They will probably lose revenue as a
13 result of it. It will be an industry leader. And it's not as
14 simple of a case as we just got together and settled the case
15 shortly after doing it. It's a big deal in this industry. And
16 I hope that it's going to continue with the other cases and the
17 other outlets, the other retailers.

18 THE COURT: Why does Michael Kors have to wait six
19 months to make that change in the store?

20 MR. OSTROW: I'll defer to counsel.

21 THE COURT: Yeah.

22 MR. OSTROW: My understanding is they're going to
23 attempt to do it earlier, and I think the language is that we
24 would -- that they could do it earlier, and I believe that they
25 were.

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1 MR. JOHNSON: That's exactly right, your Honor. I
2 think their intention is to do it as soon as they get the
3 signal from your Honor that, in fact, the settlement is going
4 to go through, but they want to do it as soon as at all
5 practical.

6 THE COURT: In terms of getting notice to the people
7 who may have claims here, why can't Michael Kors post notice in
8 its outlet stores? Wouldn't that be the very best place to let
9 Michael Kors' customers know that they may be able to assert a
10 claim?

11 MR. OSTROW: Is the question to me, your Honor?

12 THE COURT: Well, it's really a question for Mr. Fagen
13 and his colleague.

14 MR. FAGEN: Your Honor, we think --

15 THE COURT: I'm sure you don't want to do that.

16 MR. FAGEN: We do not want to do that.

17 THE COURT: But wouldn't that be a really good way,
18 Mr. Fagen to get notice to the people who were harmed?

19 MR. FAGEN: Maybe yes, maybe no. The members of the
20 class may not be the people who are shopping in a particular
21 outlet today. And I also tell you the notice provisions in the
22 settlement are fairly aggressive including the use of our
23 mailing list to find out who was involved at the stores and
24 consumers during the relevant period of time.

25 So, no, we don't want to do it for obvious reasons,

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1 but I don't think we're doing something here that's going to be
2 much concealed from our consumer base. We're talking about a
3 fairly aggressive notice program as against precedence in the
4 industry.

5 THE COURT: Does the mailing list include any e-mail,
6 customer e-mail lists?

7 MR. FAGEN: I think it does, your Honor. Your Honor,
8 just a couple of comments, if I may, at this moment?

9 THE COURT: You may.

10 MR. FAGEN: I take your Honor's points from the
11 questions you've raised. My recollection of how this evolved
12 starts with our October conference before you, your Honor, at
13 which time, obviously, the subject of resolution came up. I
14 remember talking to you about the Polo Ralph Lauren settlement
15 that we, by coincidence, handled years ago. And when we left
16 this courthouse, we started the conference. And it was
17 tortured with requests for oral/written data, computers for
18 weeks, multiple meetings, till we realized that we were at such
19 war that we enlisted Eric Green, the mediator, who spent an
20 enormous amounts of time analyzing the case, asking for
21 information, meeting with the parties, negotiating, helping us
22 to negotiate. So I don't want your Honor to come to any
23 conclusion that this was a quickie or that this was easy or
24 that this was some kind of a Peppercorn Settlement. This, in
25 our view -- I mean, your Honor may recall we said in October we

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1 never really thought very much of this claim. I know they'd
2 violently disagree, and we very much respected the arguments in
3 favor of class certification. So as we look at this, my
4 colleague used the word "excellent." I would call it a
5 generous settlement given the merits of the claim, and I would
6 say that our adversaries here were quite aggressive in
7 representing the interests of the class and spent a great deal
8 of time. As your Honor will know better than I, some cases
9 settle without expenditure of dollars, hours, discovery,
10 deposition. When you're dealing with professionals, you can
11 cut to the chase, and these guys knew their claim and they got
12 the data out of us, which we weren't thrilled to give them huge
13 amounts of sensitive information about what their damages
14 claims might be constructed to be.

15 So I don't love this deal because I didn't love the
16 merits, but I think there's something to be said about settling
17 a case efficiently and early; and I think the number is quite
18 generous. And more than that, we're allowing these plaintiffs
19 in the class to get cash. That's never happened in these kind
20 of consumer cases before, to my knowledge. The Polo Ralph
21 Lauren settlement years and years ago didn't have cash and
22 didn't have half the ruckus that these guys have caused. And,
23 also, these class members who come forward and get their cash,
24 they keep the goods. We could end up paying 100 bucks to
25 somebody who bought a couple pairs of jeans. They still have

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1 the jeans, but they get the money. And on top of that, we're
2 talking about industry-leading signage, both at point of sale
3 and on the garments. Nobody else, to my knowledge, has settled
4 a case in this field with that kind of remedy. So excellent
5 settlement, no; but generous settlement, yes, with some
6 plaintiffs' lawyers who, I think, did their homework in an
7 efficient way and got the data they wanted out of us.

8 MR. ZAVAREEI: Your Honor, may I be heard?

9 THE COURT: Yes, Mr. Zavareei.

10 MR. ZAVAREEI: So, your Honor, I'd just like to talk a
11 little bit about the concerns and questions you have with
12 respect to the timeline as Mr. Ostrow and Mr. Fagen have
13 already addressed. So it is true that if you look at the
14 docket, there's not a lot of litigation activity going on, and
15 I think that was directly a product of the hard negotiations
16 that were going on at the same time. It doesn't always happen
17 that way, your Honor. And I know you don't want to necessarily
18 hear about our other cases; and for reasons that we don't want
19 to prejudice our other cases, we don't want to also stand here
20 before you and tell you about all the difficulties that are
21 inherent in a case of this kind. But suffice it to say that we
22 are experienced litigators who are aware of significant
23 obstacles to winning this case. But we had, in this particular
24 instance, a defendant that had for whatever reason, a
25 motivation to talk about settlement. And for that reason, in

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1 order to build on that, we didn't go all out with discovery
2 wars and engage in battles. We built a constructive
3 relationship, hard hitting and adversarial, but a constructive
4 relationship. We have other cases where we're pursuing the
5 exact same theory, your Honor, where we're filing motions,
6 taking depositions, battling head to head, and those cases
7 might not resolve for years.

8 So I understand your Honor's concerns, but I think it
9 is important to understand that we are not here settling
10 without a lot of discovery and a lot of information because
11 this is some sort of cakewalk. That is not what happened.
12 There was a lot of work that went into this case, and I think
13 both sides realized that there's significant risks. And we
14 have a lot of experience litigating class actions between the
15 three of our firms on plaintiffs' side. We've obtained
16 excellent results in other cases. And when we do have a
17 defendant that is motivated for business reasons to settle
18 early, we want to engage with them. We want to work with them
19 to see if that is possible. And as Mr. Fagen pointed out, it
20 was not easy. There was a lot of back and forth. There were
21 in-person meetings. And Eric Green, one of the best mediators
22 in the country, was finally able to get us to an agreement.
23 Had that not happened, your Honor, trust me, you would have
24 seen a very thick, long, difficult process in this court with
25 battles over discovery. It was just beginning, fortunately, we

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1 were able to shortcut that and get an excellent result for this
2 class.

3 THE COURT: What do the plaintiffs estimate the
4 potential damages to be here if you went all the way and
5 prevailed at trial?

6 MR. OSTROW: Part of the difficulty in these cases,
7 I'll be honest with you, is that there's no body of case law
8 out there yet that defines what the appropriate measure is. So
9 what would we like to say? We'd like to say it's a billion
10 dollars and you've got to give us all our money back for all
11 the purchases. Who's going to buy that by these people that
12 are sitting there now? Could it be the differential between
13 what they say the original price is and what the person got --
14 they actually paid? Could be that. Could it be some -- you
15 know, one of the models that our expert looked at was there was
16 an average percentage markup, then you have to take into
17 account, you've got the product; you've used the product. I
18 fall back and say these gentlemen say that it's zero. So we
19 would put forth probably three or four different models, and I
20 don't know what would be accepted. I do know that when you get
21 to keep the product and you've worn the product and you're
22 going to walk away and, my best guesstimate, these people could
23 walk away with 30, 40, 50, 60, 70 dollars, that's pretty good.

24 So, like I said, probably could be a billion dollars,
25 it could be a few million dollars. But we're kind of making

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1 our way down a path that hasn't been walked by any other
2 people. And maybe back in the Polo settlement they did that,
3 but that was years and years ago. This is the first case in a
4 wave of these case where, like I said, I think the whole
5 industry's going to change. I hope the next one they'll pay
6 more, whoever that is. But the reality is I think it's going
7 to be a very good settlement, and I understand all your
8 concerns here today. I also know that we're only seeking
9 preliminary approval. And I know this is a fair and reasonable
10 settlement. I know we've done our homework. I know we'll have
11 things tightened up for you if you allow us to go forward with
12 notice, final approval.

13 I know that you've got to look at the range of what
14 the damages are, which is what you just asked, and the damages
15 could be anywhere from nothing to a billion dollars. So I know
16 that it's within that range. And in this circuit, that's
17 sufficient for the Court to give the nod to go ahead and, you
18 know, move forward. And if you don't like what you see later
19 or you do, we take our role very, very seriously. And I'll
20 tell you that I've probably done two dozen of these preliminary
21 approval arguments, and this is the first time I've been asked
22 the questions that you're asking. They are very good
23 questions. A lot of times they'll come at the end, but I think
24 at the beginning's okay, too. And I understand them, but these
25 three firms aren't three firms that you'll ever see an opinion

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1 written about where those questions that you're trying to cut
2 off, you know, we just don't do that. We'll get receipts for
3 our expenses. You're not going to see first-class travel.
4 You're not going to see any of those things. It's not about
5 that. It's about getting a settlement for the class. I say
6 excellent; he says generous. That's his job. He can't stand
7 up here and say it's excellent. He represents the defendant.
8 But it is an excellent settlement. I think it's a very rich
9 settlement.

10 If your Honor has any questions with respect to any of
11 the other parts of the settlement, be more than happy to answer
12 them.

13 THE COURT: At this point, I don't. You're going to
14 have to fill in the details in your subsequent motion for
15 approval, and we'll see what comes out after notice is issued.
16 I just want to highlight to you that I may have significant
17 qualms about incentive payments. And because many things are
18 merged into this order of preliminary approval, including class
19 certification and the appointment of counsel, I feel that I
20 have to take that issue on right now, and that's why I made it
21 clear to you. You decide among yourselves, but paragraph 9 of
22 the proposed order must be changed. Select one firm as class
23 counsel in this case. I'm indifferent to who among you it is.
24 I'm confident you're all fully qualified. But as the judge
25 presiding over the matter, I'm not signing off on this at the

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1 conclusion of an action. And I realize there's significant
2 work that needs to be done in terms of administering the
3 settlement. And the proposed -- the published notice in your
4 proposed list to be completed by August 1, that date's come and
5 gone, so that needs to be changed. I am prepared to put the
6 matter down on November 2.

7 MR. OSTROW: I would say that wouldn't -- I shouldn't
8 have cut you off.

9 THE COURT: No.

10 MR. OSTROW: November 2 for final approval hearing?

11 THE COURT: Right.

12 MR. OSTROW: We won't be able to accomplish motions
13 and do the other things. I would say the earliest is
14 probably -- I'd hopefully be on vacation -- middle of December.
15 And if you want to even be safe, make sure we don't have to
16 come back and ask permission to extend deadlines, I would say
17 early January would be appropriate.

18 THE COURT: You want to do it early January?

19 MR. OSTROW: Do it whenever you tell us to be here or
20 want us. I have that order on a flash drive if it's helpful
21 for anybody as well.

22 THE COURT: How about January 7 at 11:00 o'clock?

23 MR. OSTROW: Perfect for us.

24 THE COURT: All right.

25 MR. FAGEN: I'm fine.

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1 THE COURT: You want to submit a revised preliminary
2 approval order modifying the dates in paragraph 9?

3 MR. OSTROW: Yes, your Honor, we'll do so.

4 THE COURT: Anything further?

5 MR. OSTROW: No. All your points well-taken. Thank
6 you.

7 THE COURT: Anything further?

8 MR. FAGEN: No, your Honor.

9 THE COURT: All right. Obviously, it's always good to
10 have a settlement. I'm going to be very interested to see what
11 the response is from the class after the notice goes out. Too
12 often that's where things break down. And I really don't
13 like the notion of having to invoke the doctrine of cy-pres
14 where substantial money is left in a fund.

15 MR. OSTROW: And the reason -- the way we wrote the
16 settlement agreement, it was cy-pres or a second distribution.
17 Obviously, you'll decide which one.

18 THE COURT: Right. At some point in time, costs of
19 second distributions become a game of diminishing returns. But
20 I have a case now, a rather ancient case, in which there's a
21 settlement -- a multimillion-dollar settlement fund, and after
22 several years of outrage only \$25,000 in claims have been
23 submitted. Smith Barney transfer litigation.

24 MR. OSTROW: Not involved in that one.

25 THE COURT: No, you're not.

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1 MR. OSTROW: No. But I will tell you that you're
2 right, at some point you've reached the point of diminishing
3 returns. And I guess if we get to a point of diminishing
4 returns, then that means enough of those checks were cashed
5 because there will just be de minimis amount level left. All
6 these cases we talked, we did second distributions, all the
7 people that got money got a second round.

8 THE COURT: And in this settlement there's no
9 reversion to the defendants; correct, Mr. Fagen?

10 MR. FAGEN: I believe that to be absolutely correct.

11 THE COURT: Okay.

12 MR. OSTROW: Yes, that was nonnegotiable.

13 THE COURT: All right. Because my notion of cy-pres
14 is the United States treasury, okay, because you can invoke the
15 Jeremy Bentham's principle, which I've invoked in a recent
16 opinion in the Research Analysts cases in which \$100 million
17 was left on the table. The most good for the most people was
18 sending it to the U.S. treasury, and that's what I did. All
19 right.

20 MR. OSTROW: Thank you.

21 THE COURT: Thanks.

22 MR. ZAVAREEI: Thank you, your Honor.

23 THE COURT: Have a good afternoon.

24 (Adjourned)
25